

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, ex rel.,

Plaintiffs,

Civil Action
No. 16-12182-FDS

V.

JANSSEN BIOTECH, INC.,

February 23, 2022
4:15 p.m.

Defendant.

TRANSCRIPT OF STATUS CONFERENCE VIA VIDEO CONFERENCE

BEFORE THE HONORABLE F. DENNIS SAYLOR, IV

UNITED STATES DISTRICT COURT

JOHN J. MOAKLEY U.S. COURTHOUSE

1 COURTHOUSE WAY

BOSTON, MA 02210

DEBRA M. JOYCE, RMR, CRR, FCRR

Official Court Reporter

John J. Moakley U.S. Courthouse

1 Courthouse Way, Room 5204

Boston, MA 02210

joycedebra@gmail.com

1 APPEARANCES:

2 FOR THE RELATOR:

3 THEODORE JON LEOPOLD, ESQ.
4 POORAD RAZAVI, ESQ.
5 LESLIE KROEGER, ESQ.
6 DIANA L. MARTIN, ESQ.
7 CASEY M. PRESTON, ESQ.
8 Cohen Milstein Sellers & Toll, PLLC
9 11780 US Highway One
10 Suite 200
11 Palm Beach Gardens, FL 33408
12 561-515-1400
13 tleopold@cohenmilstein.com
14 prazavi@cohenmilstein.com
15 lkroeger@cohenmilstein.com
16 dmartin@cohenmilstein.com
17 cpreston@cohenmilstein.com

11 FOR THE DEFENDANT:

12 ETHAN M. POSNER, ESQ.
13 STACEY K. GRIGSBY, ESQ.
14 SARAH TREMONT, ESQ.
15 KRISTEN M. COBB, ESQ.
16 Covington & Burling LLP
17 One CityCenter
18 850 Tenth Street, N.W.
19 Washington, DC 20001
20 202-662-6000
21 eposner@cov.com
22 SGrigsby@cov.com
23 stremont@cov.com
24 kcobb@cov.com

19 SHAILEE DIWANJI SHARMA, ESQ.
20 Jenner & Block LLP
21 1155 Avenue of the Americas
22 New York, NY 10036
23 212-407-1748
24 ssharma@jenner.com
25

P R O C E E D I N G S

(The following proceedings were held via videoconference before the Honorable F. Dennis Saylor, IV, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on February 23, 2022.)

THE CLERK: Court is now in session in the matter of United States v. Janssen Biotech, Inc., civil action 16-12182.

Just a reminder that photographing, recording and rebroadcasting of this hearing is prohibited and may result in sanctions.

Would counsel please identify themselves for the record starting with the plaintiff.

MR. LEOPOLD: Good afternoon, your Honor. Thank you for having us. Ted Leopold on behalf of the relator, along with my partners, Poorad Razavi, Leslie Kroeger, Diana Martin, and Casey Preston.

THE COURT: All right, good afternoon.

MR. LEOPOLD: Good afternoon.

MR. POSNER: Good afternoon, your Honor. Ethan Posner, Covington & Burling for Janssen. I'm joined by my colleagues Stacey Grigsby, Sarah Tremont, Shailee Sharma, and Kristen Cobb.

THE COURT: Good afternoon.

1 All right. This is a status conference in this case.
2 Thank you for your patience and allowing me to postpone this.
3 I have a trial that was supposed to last a week that is lasting
4 two days. Believe me, that is good news, but it's making me
5 scramble a little bit here to prepare jury instructions and
6 whatnot.

7 So I understand that Magistrate Judge Kelley issued a
8 series of orders I guess at the end of last week. I glanced at
9 those but haven't had really a chance to digest them. I had
04:16 10 hoped to do it before today and didn't have a chance to. But
11 with that as a prelude, where are we generally and where do we
12 go from here, Mr. Leopold?

13 MR. LEOPOLD: Thank you, your Honor.

14 Your Honor, you are correct that last Thursday
15 Magistrate Kelley entered a lengthy order on the motion for
16 reconsideration and then also two additional orders on motions
17 to compel document production. Specifically on the motion for
18 reconsideration, she allowed and upheld her earlier ruling in
19 allowing 12 custodians. She allowed discovery to be expanded
04:17 20 through February of 2020. She also allowed reasonable searches
21 for all employee files, and expect the parties to meet and
22 confer about the best way to handle that. And she also ordered
23 that we will be -- we, the relators, will be allowed to pick
24 three lawyer custodians, if you will, to address the *scienter*
25 issue, and the parties will need to meet and confer on that

1 issue as well.

2 In regards to the two orders on the motions to compel,
3 there were approximately 20 different requests for productions
4 that the defendant, Janssen, will need to be responding to.
5 We'll have to work in a meet and confer hopefully in the next
6 few days about a time frame for that. The magistrate's order
7 didn't have a specific time frame when things would be --
8 documents, if you will, would be due, so hopefully we can work
9 out that.

04:18 10 I have put off having that meet and confer for right
11 now pending -- I wasn't sure if the -- Janssen was going to be
12 appealing any of these rulings, so I wanted to wait and see
13 what happens with that first. I'm not sure if they're in a
14 position to set forth that at this time.

15 In addition, your Honor, we have basically two other
16 pending motions. We have a motion to compel answers to
17 interrogatories 20 through 22, which is Docket 263, as well as
18 Janssen's response to those -- motion to compel.

19 The matter that your Honor asked us to brief, as well
04:19 20 as Magistrate Kelley, on the issues of advice of counsel is all
21 briefed. That is pending before your Honor. That hasn't been
22 referred. I don't know, again, if your Honor is going to be
23 keeping that or referring that --

24 THE COURT: I was expecting to keep it, which is why I
25 haven't referred it. So I think it probably should be on my

1 plate, is the answer to that, and I think it makes sense to
2 probably schedule a hearing on that constellation of issues.

3 MR. LEOPOLD: And that, again, is fully briefed.

4 So, other than that, that's where we stand. There's a
5 lot of discovery that is owed.

6 I believe it's February 26th or 28th is when the
7 discovery is to close based on the previous Court's order, so
8 we might want to address that issue today, about scheduling,
9 also summary judgment schedule, trial schedule, and things of
04:20 10 that sort.

11 Other than that, your Honor, really the litigation of
12 actually litigating the case is basically -- and when I say
13 that, I mean depositions, is basically on hold because Janssen
14 has refused to produce any witnesses pending all of these
15 rulings so that their position is witnesses won't have to be
16 produced twice.

17 THE COURT: All right.

18 Mr. Posner.

19 MR. POSNER: Well, your Honor, yeah, the magistrate
04:20 20 has ordered a dramatic expansion of discovery. The highlights
21 are that the relator is going to pick 12 new custodians. We
22 had previously said that was likely going to take an additional
23 six to nine months. I don't think the magistrate took issue
24 with that time frame. She expanded the time frame for some of
25 the custodians to go from 1998 to May of 2020, for many others

1 from May of 2006 to May of 2020. That requires us to redo all
2 the email searches or many of the email searches we already
3 did.

4 THE COURT: Well, let me -- I assume you're going to
5 appeal, at least --

6 MR. POSNER: I'd like to be candid with your Honor. I
7 mean, if -- we already appealed on a number of these issues;
8 your Honor, I think, sent it back for reconsideration.

9 Look, it's -- all of this taken together, it's going
04:21 10 to add, I don't know, you know -- I don't know what all the
11 custodians are, at least a year and a half to two years to the
12 process.

13 THE COURT: Whether that's true or not, you know,
14 again -- and maybe you haven't decided -- but if you're going
15 to appeal it to me, I'll either say "yes" or "no," or, you
16 know --

17 MR. POSNER: I guess, your Honor, what I was trying to
18 do was if that expansion, you know, is -- you know, if you've
19 given direction to the magistrate and her rulings reflect that,
04:22 20 then there's no point of me appealing. If your Honor -- you
21 know, I was just trying to gauge -- look, we obviously think
22 this is an unnecessary expansion. I don't want to waste the
23 Court's time with more paper if the magistrate's rulings are
24 reflective of your Honor's guidance. But it's certainly our
25 plan to appeal.

1 THE COURT: Well, I can't answer that in the abstract
2 because I haven't drilled down into it. It's the role of
3 counsel to point out what's wrong with it and, you know, and I
4 certainly had some thoughts about the direction I thought it
5 ought to go in, but I had not studied in any detail, again --
6 I'm not even sure I could fairly say that I read her orders. I
7 glanced through them quickly. I had intended to study them in
8 advance of this, I've been caught up in this trial and didn't
9 have a chance to.

04:23 10 So, it's up to you. You can appeal it or not. I have
11 a very passive job here, which is to, you know, wait for
12 someone to ask me to do something, and then I'll do it. And so
13 it's up to you. And I'm not going to just say, Well, let's
14 extend the discovery deadline two years. I'm not going saying
15 I'm going to agree with you, maybe I will, maybe I won't, or
16 maybe I'll, agree in part and disagree in part, I don't know.
17 But if you're going to appeal, let's wait and let's -- I'll see
18 what your appeal says.

19 And in the meantime, I think I ought to take up this
04:24 20 issue of the advice of counsel defense or however it is that's
21 framed. And it looks like I need to bump out the discovery
22 deadlines at least somewhat here while we're sorting all this
23 out.

24 MR. POSNER: Yeah, we're going -- our plan was to
25 appeal.

1 THE COURT: Okay.

2 All right. And ballpark, assuming you do appeal, all
3 that would probably be ripe in about three weeks or so, does
4 that sound about right?

5 MR. POSNER: Yeah, I'd have to go back and look, but
6 that sounds about right, your Honor.

7 THE COURT: Okay. All right. I'm always fooled by
8 the fact that February only has 28 days.

9 I think what I would like to do is to set this for a
04:24 10 hearing on both sets of issues, advice of counsel and whatever
11 appeal you're going to do, so that I'm thinking about all of it
12 at once kind of like a package, and I think I'd like to do
13 that -- I was going to say the third or fourth week of March,
14 but I think really more realistically April 1st or 2nd more
15 likely will be the time frame for that.

16 That hearing may take a while.

17 Matt, do I have a free afternoon in that time frame?

18 THE CLERK: Judge, it looks like the morning of April
19 4th on a Monday is open.

04:25 20 THE COURT: All right, let's do that. Morning of
21 April 4th.

22 THE CLERK: 10 a.m.

23 THE COURT: Why don't we make it 9:30. We'll do it by
24 Zoom so nobody has to fly up here, and we'll be -- there are
25 the two pending motions, I think one of them is a motion to

1 compel answers to interrogatories, and the motion to compel
2 disclosure of legal opinions, again, what I'll call the
3 constellation of the advice of counsel defense issues, and then
4 this what I'll call the expansion of discovery issues based on
5 Magistrate Judge Kelley's orders, whatever appeals are flowing
6 from that. We'll hear all of that on that day.

7 In the meantime, I will extend discovery -- well,
8 let's say for the time being until the end of April, I'll just
9 push it out. We may need to do that further, but I'll just
04:26 10 keep bumping it.

11 Why don't I say all current discovery deadlines are
12 pushed out 60 days, we'll say.

13 And the only other thing, there are some -- two very
14 old motions that, again, relate to this issue of what I'll call
15 expansion of discovery, No. 159 and 167. I think they've been
16 overtaken by events. I think a lot has changed since then.
17 They've been dangling for a while sort of waiting to see what
18 happened with the magistrate judge. What I think I'd like to
19 do is clear those from the calendar and deny them both without
04:27 20 prejudice. I think whatever is in there is kind of subsumed
21 with whatever we're talking about now. If there's something in
22 there that you want to renew, that's fine, or -- I just --
23 unless I'm wrong about that, Mr. Posner, I think they may be
24 both your motions, but I think both of those relate to this
25 idea of, you know -- well, I'll ask you. Is that okay, or do

1 you think that's inappropriate?

2 MR. POSNER: I don't have 159 and 167 on my
3 fingertips.

4 THE COURT: That's how old they are. I've got to
5 scroll up here for quite aways.

6 159 is a motion to compel production of documents,
7 which I think it -- I need to look at the memo, not the motion,
8 of course.

9 MR. POSNER: We're happy to take a look at that if you
04:28 10 wanted --

11 THE COURT: The plaintiffs' motions and it's -- again,
12 my memory, and it's been a while since I looked at this, is
13 that all of this has to do, again, with what I'll say is the
14 question of, you know, has discovery been artificially limited,
15 can it be expanded, does plaintiff need these documents to
16 properly prosecute their claims?

17 And I may be wrong on that. Mr. Posner, I'll put that
18 question to you.

19 And 167 I think is motion to expand discovery. And
04:29 20 let me find it again. Yes, that's what it's called in the
21 memorandum -- I'm sorry, motion to expand discovery, and that
22 directly addresses the issue of are we limiting things to
23 Central Pennsylvania or not.

24 I just -- you know, the motions have been pending for
25 a long time and it seems to me that they're out of date. I'm

1 not trying to make a substantive ruling here but just not leave
2 a motion dangling if it's been overtaken by events, and my
3 sense is that it has.

4 MR. POSNER: We're fine with you denying those
5 motions.

6 THE COURT: Well --

7 MR. LEOPOLD: Well, thank you, Mr. Posner.

8 Your Honor --

9 THE COURT: Mr. Leopold.

04:29 10 MR. LEOPOLD: Your Honor, what we'd like to do is
11 maybe we can defer dockets 159 and 167 pending after these
12 other matters are resolved to see where we're at. I think is
13 probably the best.

14 THE COURT: What I'm going to do is I'm going to clear
15 the docket. I'm going to deny them without prejudice to their
16 renewal, and you can just bring them back to life, like a
17 horror movie monster, if you want, or maybe it's part of it,
18 where I need to decide part B of your motion. Whatever it is,
19 like if it hasn't been resolved by all of this, if there's
04:30 20 something left, I want it resolved. It's just I also don't
21 want to spend a lot of time working through those motions when
22 I think a lot of it has been --

23 MR. LEOPOLD: I certainly think 167 has sort of been
24 encompassed within the motion for reconsideration. We'll look
25 at 159 and -- but both of them can be denied without prejudice

1 and we'll address those appropriately.

2 The only thing I would ask, your Honor, and for
3 clarification a little bit is I understand Janssen is moving
4 for reconsideration -- excuse me, objecting to the
5 reconsideration order, but the other two discovery motions to
6 compel orders from last Thursday, are those on hold? Is
7 Janssen going to be moving on those as well?

8 THE COURT: I understood -- whatever he objects to,
9 you know, he may object to everything. Whatever he objects to
04:31 10 I want to be part of my April 4th package of --

11 MR. LEOPOLD: That's fine. We'll hold off on anything
12 until at least next Thursday we know what they're moving on.

13 THE COURT: Okay. All right. And I want to get all
14 this on track.

15 All right.

16 MR. LEOPOLD: Yes, your Honor. Thank you for your
17 time.

18 MR. POSNER: Thank you for your time, your Honor.

19 THE COURT: Okay. Thanks everyone.

04:31 20 (Court adjourned at 4:31 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript
of the record of proceedings in the above-entitled matter to
the best of my skill and ability.

/s/Debra M. Joyce
Debra M. Joyce, RMR, CRR, FCRR
Official Court Reporter

September 19, 2023
Date